(1)

93-965

CASE NO. _____

Supreme Court, U.S.
FILED
DEC 17 1993
OFFICE OF THE CLERK

UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

RONALD A. LEVESQUE, PETITIONER

V.

KATHLEEN M. LEVESQUE, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

PETITION FOR WRIT OF CERTIORARI

DANIEL A. LAUFER
Counsel of record for
Ronald A. Levesque
103 Bay Street
Manchester, NH 03104
Tel. (603) 647-8887

71 pp

QUESTION PRESENTED FOR REVIEW

Whether the mandatory tolling provisions of Section 525 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix Section 525, operate to toll during the period of military service of a party to an action duly filed and served the limitation period under local court rules for bringing the action to trial.

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND AUTHORITIES ..... Page 1

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OR OPINIONS IN THE INSTANT CASE ..... Page 2

JURISDICTION ..... Page 3

THE FEDERAL STATUTE AND STATE SUPERIOR COURT RULE INVOLVED ..... Page 5

STATEMENT OF THE CASE ..... Page 7

ARGUMENT ..... Page 12

APPENDIX ..... Page 20

CASE NO. _____

UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

RONALD A. LEVESQUE, PETITIONER

V.

KATHLEEN M. LEVESQUE, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

PETITION FOR WRIT OF CERTIORARI

DANIEL A. LAUFER
Counsel of record for
Ronald A. Levesque
103 Bay Street
Manchester, NH 03104
Tel. (603) 647-8887

TABLE OF CASES,

STATUTES AND AUTHORITIES

Statutes:

Conroy v. Aniskoff,
123 LEd 2d 229
(1993) ..... Page 13

Zitomer v. Holdsworth,
449 F 2d 724
(3d Cir. 1971) ..... Page 14

Buttler v. City of Los Angeles
200 Cal. Rptr. 372
(Cal. App. 2 Dist. 1984),
Cert denied, 469 US 883
(1984) ..... Page 15, 16

Cahill v. Northeast Airlines,
42 A D 2d 564, 344 N.Y.S.
2d 372 (NY 1973) ..... Page 16

Hodgins v. Hodgins,
197 A 2d 1187
(NH 1985) ..... Page 9

Zallinsky v. Laudenslager,
167 A 2d 317
(Pa 1981) ..... Page 15

P.L. 102-12 ..... Page 13

50 U.S.C.S. App.
Section 510 ..... Page 17

50 U.S.C.S. App.
Section 525 ..... Page 5,10,11,12
13,14,17,18

New Hampshire Superior
Court Rule 151 ..... Page 6,8,10

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE INSTANT CASE

The opinion of the Superior Court of the State of New Hampshire was rendered on September 24, 1992, and is contained in the Appendix. The opinion of the Supreme Court of New Hampshire was rendered on September 30, 1993, and is contained in the Appendix. It may be found at 631 A.2d 925 (1993).

JURISDICTION

On September 30, 1993, the New Hampshire Supreme Court entered a judgment affirming the decision of the Rockingham County Superior Court entered on September 24, 1992.

This Court has jurisdiction to grant a Writ of Certiorari because the New Hampshire Supreme Court, the court of last resort in the State of New Hampshire, has decided a federal question in a way that conflicts with the decisions of other state courts and with the United States Code. Further, this Honorable Court has jursidiction because the New Hampshire Supreme Court, has decided an important question of federal law that has not been, but should be settled by this court.

28 U.S.C. Section 1257 confers jurisdiction on this Court to review the judgment in question by Writ of Certiorari.

THE FEDERAL STATUTE AND STATE SUPERIOR COURT RULE INVOLVED

50 U.S.C.S. App. Section 525. Statutes of limitations as affected by period of service.

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs

after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax or assessment.

New Hampshire Superior Court Rule 151.

All marital cases, which shall have been pending upon the equity docket for two years, shall be dismissed.

STATEMENT OF THE CASE

This is a divorce case between parties who were married on September 21, 1968. Plaintiff is a retired Air Force Sergeant who served on active duty from 1964 until June 1991. The parties were separated on January 1985 when the plaintiff was transferred to England on an unaccompanied tour where he remained until May 1991. Defendant remained in the parties' home in Portsmouth, NH following their separation.

Prior to separating, the defendant on October 24, 1984 filed a Libel for Divorce in Rockingham County Superior Court, Docket No. 84-M-1419 on the grounds of irreconcilable differences. Plaintiff was duly served and appeared pro se. On March 11, 1987 while the plaintiff was stationed in

England, the Rockingham County Superior Court Clerk sua sponte dismissed defendant's Libel for Divorce, Docket No. 84-M-1419 under Superior Court Rule 151 since there had been no activity in two years. Plaintiff never received notice of the dismissal. Upon his return from England, plaintiff discovered the Libel for Divorce had been dismissed and brought his own Libel for Divorce on May 7, 1991 on the grounds of irreconcilable differences.

In the decree of divorce the Master found that the irreconcilable differences causing the irremediable breakdown of the parties' marriage as alleged in defendant's Libel for Divorce, Docket No. 84-M-1419, continued until the date of the final hearing, August 24, 1992. (See Plaintiff's Proposed Findings of Fact

#26-Granted).

The law of the State of New Hampshire uses the date of filing of the Libel for Divorce as the pertinent date for dividing pensions, Hodgins v. Hodgins, 497 A 2d 1187 (1985). In applying the Hodgins rule to the present case, the Master ruled that for purposes of dividing plaintiff's military retirement pay, the pertinent date was the date of filing of plaintiff's Libel for Divorce on May 7,1991, not the date defendant commenced divorce proceedings on October 24, 1984. The final decree awarded defendant a 50% share of any and all pension benefits acquired by the plaintiff by virtue of his military service from September 21, 1968 until May 7, 1991.

Although the issue of the tolling

provisions of the Soldiers' and Sailors' Civil Relief Act was not raised in the pleadings prior to trial, the Master acknowledged at trial that plaintiff's absence from the State of New Hampshire on military service during the pendency of the first Libel raised a possible issue under the Soldiers' and Sailors' Civil Relief Act. In his appeal to the New Hampshire Supreme court, the plaintiff presented the issue of whether the Rockingham County Superior Court's dismissal of defendants Libel for Divorce filed on October 24, 1984 pursuant to New Hampshire Superior Court Rule 151 and the subsequent failure of the marital court to use the date of the filing of defendant's Libel for Divorce as the pertinent date for purposes of dividing plaintiff's

military retirement pay violated the mandatory tolling provisions of the Soldiers' and Sailors' Civil Relief Act. 50 U.S.C.S. App. 525.

The New Hampshire Supreme Court concluded that Section 525's directive to toll the time for the bringing of any action had no applicability to an action duly filed and served and unanimously affirmed the lower court's decision on September 30, 1993.

ARGUMENT

The narrow issue before the court is whether the tolling provisions of Section 525 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, apply to the limitation periods under state court rules for bringing a pending action to trial.

The applicability of the tolling provisions in Section 525 to limitation periods under local court rules for bringing a pending action to trial raises an important question of federal law which needs to be settled by this court. It is critical for members of our armed services who are parties to pending litigation to understand the extent of protection afforded them under Section 525 in order that they may devote their full attention to their duties.

Because of differing interpreting of the word "bringing" as used in Section 525, it is necessary for this court to settle this question of interpretation so that the extent of the protection afforded by Section 525 is clear.

Although the Soldiers' and Sailors' Civil Relief Act was amended in 1991, P.B.L.No. 102-12, 102nd Congress, 1st Session, 105 Statute 32, that amendment left Section 525 intact except for substituting October 6, 1942 for "the date of enactment of the Soldiers' and Sailors' Civil Relief Act, amendments of 1942." The question of interpretation with respect to the word "bringing" as set forth in Section 525 remains unsettled.

In Conroy v. Aniskoff, 123 LEd 2d 229 (1993) this court recently held

that the provisions of Section 525 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, are mandatory and are to be construed with a literal interpretation. However, a literal interpretation of Section 525 does not clarify the meaning of "bringing" in the statute as the word still remains subject to differing interpretations.

The state courts are in conflict in their interpretation of whether the tolling provisions of Section 525 apply to the bringing to trial of lawsuits already filed. The Untied States Circuit Court of Appeals for the 3rd Circuit has held that the tolling provisions of Section 525 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, have no applicability to an action duly filed and served. Zitomer v. Holdsworth, 449

F 2d 724. 726 (3d Cir. 1971). This narrow interpretation has been adopted by New Hampshire in the present case and by Pennsylvania. Zarlinski v. Laudenslager, 167 A 2d 317, 320 (1961).

In a conflicting interpretation, the California Court of Appeals, 2d District ruled that the tolling provisions of Section 525 of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, apply to toll the running of a five year period for bringing to trial an action that had already been filed because there was no rational basis for applying Section 525 to the limitation periods for initiating an action but not applying it to limitation periods for bringing an action to trial. Buttler v. City of Los Angeles, 200 Cal, Rptr, 372, cert. denied, 469 US 883 (1984). This

interpretation of Section 525 has been adopted by New York. Cahill v. Northeast Airlines, 42 Ad 2d 564 (1973).

The court in Buttler reasoned that the tolling provisions of Section 525 must apply to the limitation periods for bringing an action to trial because it is during the period between filing a complaint and bringing the action to trial that the worries and distractions of civil litigation most commonly arise that need the protection of Section 525 and that to hold otherwise would effectively discourage persons who already had filed lawsuits from enlisting in the armed forces. Buttler v. City of Los Angeles, 200 Cal, Rptr, 372, cert. denied. 469 U.S. 883 (1984).

The stated purpose for enacting

The Soldiers' and Sailors' Civil Relief Act of 1940, was to suspend the enforcement of civil liabilities of persons in the military service in order to enable those person to devote their entire energy to the defense needs of the country by suspending legal proceedings and transactions 50 U.S.C.S. Appendix Section 510. Certainly, applying the tolling provisions of Section 525 to relieve both military service members and their opposing parties from the onus of bringing a pending case to trial by a permanently fixed deadline is within the zone of protection intended by the Act. 50 U.S.C.S. Appendix Section 510.

In the present case, if the local two year limitation period for bringing a divorce action to trial had been tolled, the court would have divorced

the parties on defendant's Libel for Divorce filed October 24, 1984 and would have used that date as the pertinent date for dividing plaintiff's military retirement pay. This would have allowed plaintiff to retain all retirement pay benefits earned by him after October 24, 1984.

In view of the foregoing, the petitioner respectfully submits that it is entirely appropriate for this honorable court to grant his Petition for Writ of Certiorari to the New Hampshire Supreme Court in order that this court may resolve the conflicting interpretations that have been given Section 525, settle an important question of federal law that remains unsettled and afford the petitioner of protection intended to be granted by the statutes of the United States and

by the Soldiers' and Sailors' Civil Relief Act.

The petitioner therefore respectfully requests that this honorable court grant his Petition for Writ of Certiorari.

Respectfully submitted,

Daniel A. Laufer
Counsel of record for
Ronald Levesque
Duffy and Laufer
103 Bay Street
Manchester, NH 03104

STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY

SUPERIOR COURT
DOCKET NO. 91-M-711

Ronald A. Levesque

v.

Kathleen M. Levesque

Decree of Divorce

Following a final hearing on August 24, 1992 at which both parties were represented by counsel and the Guardian ad Litem was present, the Master recommends that the following decree be entered:

1. Divorce Decreed. Cause: irreconcilable differences which have caused the irremediable breakdown of the marriage. Decree on the Libel; Cross-Libel dismissed.

2. The parties are awarded joint legal custody of the minor child, Jonathan Levesque age 14 1/2. Primary physical custody of Jonathan is

to the Defendant, Kathleen Levesque. The parties have two other children, Christine and Matthew, both of whom are over the age of 20 years old.

3. Pursuant to the recommendations of the Guardian ad Litem and the agreement of the parties, Ronald shall have no direct contact with Kathleen. Should Ronald wish to have visitation with Jonathan, he shall make contact with Jonathan directly by phone or mail or shall make the necessary arrangements through his own parents. All requests for visitation shall be made at least one week in advance and should not interfere with previously scheduled activities for Jonathan. Visits shall be limited to the daytime hours. Jonathan will be picked up at Ronald's parents' home unless Kathleen agrees to other

arrangements. If evidence is presented in the future that Jonathan is being placed at risk or emotional or physical harm as a result of such visits, the visits shall be suspended automatically pending further hearing and a Guardian shall be appointed, at the Plaintiff's expenses, to make further recommendations to this Court.

The plaintiff shall provide the defendant with his residential address and telephone numbers at all times in order to effectuate the provisions of this decree and to allow Kathleen to reach him in the event of any emergency associated with the children. The defendant shall also provide the plaintiff with notification of any changes in her address or telephone number.

4. The plaintiff shall pay to

the defendant the sum of $448 per month as child support pursuant to RSA 458-C. The defendant is found to be $700 in arrears of his support obligation under the Temporary Decree as of September 1, 1992. This arrearages shall be paid at the rate of $50 per month until paid in full.

Payment shall be made through the New Hampshire Division of Human Services by mandatory wage assignment, effective forthwith.

For purposes of calculating the amount of child support, the Master included the present wage income of both parties as well as the pension income as to both parties as ordered herein.

The defendant is awarded the tax exemption for all of the children.

The plaintiff's child support

obligation shall terminate when Jonathan graduates from high school or becomes eighteen years old, whichever occurs last.

5. The plaintiff shall maintain his CHAMPUS medical insurance coverage for the children and he shall provide the defendant with all necessary identification cards and forms required to provide medical treatment for the children pursuant to CHAMPUS. The defendant should also maintain her medical insurance policy if available to her in light of the fact that CHAMPUS providers may not be conveniently available and may not cover all procedures. Each party shall pay 1/2 of any unreimbursed medical, dental, optical or counseling expenses for Jonathan not otherwise covered by insurance.

6. Each party shall maintain life insurance coverage on his/her life in the minimum amount of $25,000 and shall name the other party as the sole beneficiary thereof until such time as the plaintiff no longer has a child support obligation and/or Jonathan completes college, whichever occurs last.

7. By agreement of the parties, the plaintiff is awarded those items of personal property on the itemization entitled "Collectibles". The defendant shall deliver the agreed items to the plaintiff's parents' home within 30 days of the date of this decree, except for the desk as to which the parties will have to make other delivery arrangements.

Otherwise, each party is awarded the personal property and furnishings

in his/her possession.

8. Each party is awarded any vehicles in his/her possession subject to any encumbrance thereon.

9. The parties own a home at 334 Maplewood Avenue, Portsmouth N.H. The parties had an appraisal performed and according to that appraisal the present value of that property is $68,000. There are two encumbrances against the property which total $29,087, resulting in a net equity at this date of approximately $38,913.

The Master finds that because the total of the mortgage and tax payment on the home is approximately $431 per month, it would not be probable that the defendant could find comparable housing for herself and the three children (although there is only one minor child, the other two adult

children are also residing with the defendant and although they are considered to be emancipated, they are still dependent on some degree upon the defendant for their living) for a comparable cost should she be required to relocate at this point. The Master also finds that the parties separated in January of 1985. Following the separation, the plaintiff paid to the defendant $600 per month in child support. During this time the plaintiff was residing in England in the military and the defendant was maintaining the marital home. The Master also notes that during this time, all three of the children were minors at one point. The child support was later reduced by the plaintiff to $500 per month. Beyond this child support, which was faithfully paid, the

plaintiff made no further financial contributions to the family nor any direct payment towards the maintenance of the marital home by way of mortgage payments, tax payments, insurance or repairs. The defendant had the entire burden of maintaining the home through her own employment as well as providing for the children not only in terms of financially, above and beyond the plaintiff's child support obligation but emotionally, and socially. Accordingly, as to the real estate alone, the Master finds that it would be appropriate in this case to award an unequal division of the real estate and to award the plaintiff a 40% interest in the real estate and the defendant a 60% interest in the real estate. As to all other assets of the parties, an equal division is awarded.

Accordingly, the defendant is awarded the marital home subject to the provision that when Jonathan graduates from high school, the property shall be placed on the market for sale and upon sale, the plaintiff shall receive 40% of the net and defendant shall receive 60% of the net proceeds from the sale. See also paragraph 10, below.

The plaintiff shall execute a quitclaim deed to the defendant within 30 days from the date of this decree subject to the terms of this decree.

The defendant may purchase the plaintiff's interest in the real estate at any time at her sole election until sale. If the parties agree to a buy-out, the parties should then have another appraisal done at that time and agree upon an appropriate buy-out price.

The defendant shall be solely responsible for the payment of the mortgage, taxes and repairs to the building pending sale or other disposition.

10. The defendant has a pension at the Portsmouth Naval Shipyard. If she terminates her employment there for any reason, she may roll this pension over into an IRA which she has indicated she would do. As of the date of the filing of this Libel for Divorce, the defendant's pension is found to have a cash value of $10,641.80. The plaintiff is awarded 1/2 of this amount or $5,230.90. This cash value shall be paid to the plaintiff at the time of the disposition of the real estate by way of a credit to him and a payment to him by the defendant in this amount.

that, for whatever reason but by mutual agreement, both parties decided not to pursue the action at that time. When the plaintiff returned in 1991 he commenced this action for divorce. Since the original divorce was dismissed without objection or further order on March 11, 1987, the present divorce action that was filed in 1991 will be used for all purposes in this final decree.

Accordingly, the defendant is found to be entitled to fifty percent of any and all pension benefits acquired by the plaintiff by virtue of his military service during the term of the marriage, from the date of the marriage on September 21, 1968 until May 7, 1991, when this Libel for Divorce was filed.

Counsel shall file a Qualified

Domestic Relations Order for Court approval pursuant to the "Hodgins" formula within thirty days from the date of this Decree.

11. The plaintiff is permanently restrained from interfering with the peace or liberty of the defendant in any fashion and from entering the defendant's residence or place of work without her express permission in advance.

12. The plaintiff shall pay to the Guardian ad Litem within sixty days from the date of this Decree the sum of $356 for his fee plus any and all costs and expenses and fees of the Guardian in preparing for and attending the final hearing on the merits. Pursuant to Order of March 23, 1992, the plaintiff was ordered to pay all expenses of the Guardian ad Litem.

Subject to this provision, the defendant is awarded all other right, title and interest in her pension/retirement plan.

The plaintiff receives a military pension. The parties were married on September 21, 1968. The plaintiff began his active duty military service in 1964 with a brief period of interruption before he joined the Air Force in 1969. The plaintiff was credited with his army service towards pension credits. The plaintiff retired in June of 1991 and receives full military pension benefits since he had over 20 years of service, most of which accumulated during the term of the marriage.

The plaintiff argues that because a Libel for Divorce was filed on October 24, 1984 (Docket No. 84-M-1419)

and the parties separated in 1985 that the date of determining the pension rights should be October 24, 1984. The Master disagrees and adopts the defendant's position that for purposes of dividing all pensions that the pertinent date is the date of the filing of the within Libel for Divorce, May 9, 1991. The initial Libel for Divorce filed in 1984 was dismissed pursuant to Superior Court Rule 151 since there had been no activity in that file for a period of over two years. In that file, the defendant had filed a pro se appearance and, although the plaintiff spent most of his time in England between 1985 and 1991, the Master finds that the plaintiff had full knowledge of the divorce action, that he and the defendant discussed it from time to time through the years but

13. The Plaintiff's Proposed Findings of Fact and Rulings of Law are all granted except for Paragraphs: 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 which are denied and Rulings numbers: 1, 2, 3, 4, 5 and 6 which are denied.

14. The Defendant's Request for Findings and Rulings are all granted except for Paragraphs: 12, 13 and 16 which are denied.

When a delinquency in the payment of support equals 1/2 of the annual support obligation, a wage assignment shall be instituted against the obligor pursuant to RSA 458-B:4; if no delinquency exists, a wage assignment may be instituted pursuant to RSA 458-B:3 if the order is payable through the Division of Human Services.

September 4, 1992

Stephanie T. Nute, Master

Master's recommendation approved.
Order in accordance therewith.

_____
Presiding Justice

DATE: _____

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS APRIL TERM, 1992

Superior Court
Docket No. 91-M-711

Ronald A. Levesque

v.

Kathleen M. Levesque

PROPOSED FINDINGS OF FACT

AND RULINGS OF LAW

NOW COMES the plaintiff, Ronald A. Levesque, by and through his attorney, Peter J. Duffy, and hereby proposes the court enter the following Findings of Fact following the hearing to be held on this case on August 24, 1992:

FINDINGS OF FACT

1. The parties were married on September 21, 1968. Plaintiff was born October 1, 1944. Defendant was born November 23, 1946.

2. Irreconcilable differences

have arisen which have caused the irremediable breakdown of the marriage.

3. The defendant initially filed a Libel for Divorce on October 23, 1984 with the Rockingham County Superior Court which libel sought to end this marriage. The parties have not cohabited since January 1985.

4. At the time defendant filed the initial Libel for Divorce in this case the plaintiff was on active duty serving in the U.S. Air Force and remained on active duty until June of 1991.

5. Plaintiff began serving in the U.S. Air Force on July 1, 1964 and served until June, 1967 during his initial term of service. Plaintiff re-enlisted U.S. Air Force on May 15, 1968 and served on active duty until June 1, 1991.

6. Defendant was married to plaintiff 16 years prior to her filing a Libel for Divorce in this case on October 23, 1984.

7. October 23, 1984 is the date for establishing valuation of the plaintiff's military retirement pay under the rule stated in Hodgins v. Hodgins, 125 NH 711 (1985).

8. Plaintiff's monthly base military pay as of October, 1984 was $1,542.00.

9. For retirement pay purposes the plaintiff was able to earn while on active duty his monthly base pay multiplied by 2 1/2% of the sum of his years of active duty service. 10 USC 1402(a).

10. During the 16 years that plaintiff was married to the defendant prior to her filing the libel on

October 23, 1984, plaintiff had earned toward his military retirement pay 40% (16 x 2 1/2%) of his ten monthly base pay of $1,542.00.

11. 40% of plaintiff's military base pay on October 23, 1984 was $617.16.

12. Plaintiff's 50% share of 40% of plaintiff's military base pay as of October 23, 1984 was one half of $617.16 or $308.58.

13. At the time the defendant filed the initial Libel for Divorce in this case, the plaintiff had served a total of 19 years on active duty in the U.S. Air Force and was 1 year short of his military retirement pay vesting.

14. A reasonable amount of plaintiff's military retirement pay to award defendant as a property settlement in this case is $308.58 as

it represents one-half of the military retirement pay that plaintiff had earned during his 16 years of marriage with the defendant up to October 23, 1984, the date of defendant's initial Libel for Divorce in this case.

15. Defendant's initial filing of her Libel for Divorce in this case caused the parties to separate.

16. The parties did not reconcile their differences at any time following October 23, 1984 and remain separated until today.

17. The parties' child, Christine, is an adult who is a fourth year student at the University of New Hampshire living in her own apartment.

18. The parties' minor child, Jonathan, is a freshman in high school living with the defendant.

19. Plaintiff and defendant are

presently employed on a full time basis. Defendant is expected to lose her job at the Portsmouth Naval Shipyard in October 1992. Plaintiff is expected to lose his job at Hanscom Air Force Base in February of 1993.

20. Defendant is entitled to separation benefits from her employment at the Portsmouth Naval Shipyard should she lose her job which separation benefits will consist of a lump sum payment for accumulated leave and one week of severance pay for each year she has worked as an employee of the facility plus a 10% increase in the resulting number of weeks severance pay for each year defendant's age exceeds 40.

21. Defendant has been employed at Portsmouth Naval Shipyard since September 1985 and will be 45 years and

11 months old in November, 1992.

22. If defendant is terminated from her employment in October, 1992, she will be eligible for at least 10 1/2 weeks of severance pay.

23. The parties own various items of tangible personal property which are presently located at the parties' home located at 334 Maplewood Avenue, Portsmouth, NH. These items consist of rugs, brass rubbings, furniture, and various collectible items which the parties accumulated while living together as man and wife, as more fully set forth in plaintiff's list of the same offered at trial.

24. The defendant since the initial filing of her Libel for Divorce on October 23, 1984 has earned her own individual retirement account as well as vested pension with the U.S.

Government from her work at the Portsmouth Naval Shipyard.

25. The Libel for Divorce filed by the defendant on October 23, 1984 was dismissed by the court on its own motion under Superior Court Rule 151. At the time the Libel for Divorce was dismissed the plaintiff was assigned in England with the U.S. Air Force and was not to return to the United States until June of 1991.

26. The irreconcilable differences causing the irremediable breakdown of the parties' marriage are alleged in defendant's Libel for Divorce filed on October 23, 1984 continued until the date of the final hearing in this case.

RULINGS OF LAW

1. Plaintiff's military retirement pay is divisible as marital

property but lacks the following characteristics of property: cash surrender value, loan value, redemption value, lump sum value and value realizable after death. Blanchard v. Blanchard, 133 NH 427 (1990).

2. The risk of uncertainty in evaluating retirement pay is avoided by a decree providing that the plaintiff pay a portion of each payment received to the defendant. Blanchard v. Blanchard, supra at 431.

3. The evaluation date for determining the value of plaintiff's military retirement pay is established as of the date defendant filed her Libel for Divorce on October 23, 1984. Hodgins v. Hodgins, 125 NH 711 (1985).

4. For purposes of establishing the evaluation date for plaintiff's military pay under the Hodgins

rationale, the subsequent Libel for Divorce filed by the plaintiff in this action relates back to the date defendant filed her Libel for Divorce on October 23, 1984 because the parties separated in January 1985 and the irreconcilable differences alleged in defendant's Libel for Divorce filed on October 23, 1984 continued up to the time of the final divorce.

5. For purposes of applying the New Hampshire Child Support Guidelines, the plaintiff's earnings as a full time employee with the U.S. Air Force at Hanscom Air Force Base are the earnings against which the child support guidelines are applied.

6. Plaintiff's military retirement pay is not included in plaintiff's earnings base for purposes of applying New Hampshire Child

Support Guidelines as it has been properly divided by this court as a marital asset.

Respectfully submitted,
Ronald A. Levesque
By his attorney

Peter J. Duffy
814 Elm Street
Manchester, NH 03101
(603) 647-8887

CERTIFICATE OF SERVICE

I, Peter J. Duffy, counsel for the plaintiff hereby certify that on this day I hand delivered a copy of the foregoing Proposed Findings of Fact and Rulings of Law to Patti Blanchette, Esq.

Dated: _____

Peter J. Duffy

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

RONALD A. LEVESQUE

v.

KATHLEEN M. LEVESQUE

NO: 91-M-711

DEFENDANT'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

NOW COMES the Defendant, Kathleen M. Levesque, and respectfully submits the following Findings of Fact and Rulings of Law.

1. The parties, Ronald and Kathleen Levesque, were married on September 21, 1968. Three children were born of the marriage: Matthew, age 23; Christine, age 21; and Jonathan, age 14. Jonathan will be 19 years old when he graduates from high school.

2. All three of the parties' children reside with the Defendant in

the marital home in Portsmouth, New Hampshire. Jonathan is entering his freshman year in high school. Matthew is enrolled in his senior year at the New Hampshire Vocational Technical College. Christine has just completed her junior year at the University of New Hampshire. Christine is a music major and was recently forced to take a year off from school due to a severe case of tendinitis.

3. Although two of the parties' children are of adult age, they remain dependent in part on the Defendant for their lodging and support. Matthew is employed part-time and Christine is currently unemployed.

4. Throughout the parties' marriage and until his retirement on May 31, 1991, the Plaintiff has been a member of the United States Air Force.

5. At the time of the parties' marriage the Defendant was 21 years old and was employed as an assembly worker. Immediately following their marriage the parties moved to Texas where the Plaintiff was stationed. The parties' first child, Matthew, was born there.

6. From the time of the marriage until May of 1984 the Defendant did not work outside of the home, but cared for the parties' growing family and moved to such locations as England, North Carolina, Spain, Texas, and Pease Air Force Base, all to further the Plantiff's Air Force career.

7. In May of 1983 the Plaintiff received orders transferring him to Turkey. Since he was able to shorten his tour there if he went without his family, he went alone, leaving the family in Portsmouth, New Hampshire.

At the same time the Defendant determined to further her education so that she would be able to find employment. In 1984 she received an Associates Degree in Electronics from New Hampshire Technical College and she became employed at the Data General Company. She worked at Data General a year and then was laid off and the company later closed its New Hampshire facility. In September of 1985 the Defendant obtained her current employment at the Portsmouth Naval Shipyard where she works as an electronics engineering technician.

8. In 1985 the parties separated, and the Plaintiff was transferred to England, where he remained for six years.

9. Although divorce proceedings were initiated at that time, legal

proceedings were not pursued and Kathleen's libel was eventually dismissed. During the time that the Plaintiff was in England the parties determined that it was in their best interest to remain married. Both parties benefitted financially from their continued marital status. The Plaintiff received additional income for housing assistance by virtue of his marital status, and the Defendant remained eligible for various military benefits.

10. The Plaintiff arrived back in the United States in approximately May of 1991 when he retired from the Air Force. The Plaintiff filed for divorce by libel dated May 7, 1991.

11. The Defendant has now received a separation notice from her employment at the Portsmouth Naval

Shipyard. After first receiving her separation notice, she was given an "on call position" on the very last day on which she was scheduled to work. Her employment status is tenuous and further layoffs are scheduled for the shipyard in October of this year.

12. The Defendant is employed in the specialized area for which there is likely to be little demand.

13. The marital home has been valued at $68,000.00. It is currently in a state of disrepair and not attractive for sale.

14. The mortgage payments on the marital home are $278.00 per month, and the outstanding balance on the mortgage is approximately $27,337.00. The property is also encumbered by a HUD loan to be paid upon sale of the property.

15. It is highly unlikely that the Defendant would be able to secure alternate housing for herself and three children at a cost close to her monthly mortgage payment.

16. Property may be awarded not as a property settlement but in lieu of periodic payments for support. Sheldon v. Sanderson 121 N.H. 845, 847 (1981)

17. In the present case Ronald's earning capacity is temporarily lessened by his lack of significant employment following his retirement. Ronald is 47 years old and likely to increase his earning capacity in the near future.

18. Throughout most of these proceedings the Plaintiff has refused to give the Defendant his residential address and telephone number. He has also refused to provide that

information to the Guardian Ad Litem. The Plaintiff's attitude toward the Defendant also calls into question his willingness to provide information to the Defendant which will allow for the meaningful calculation of future support payments. Kathleen faces a significant risk to not being able to locate the plaintiff in the event of any default in his obligations to pay support.

19. In awarding the marital home to the Defendant the Court has considered the following factors set forth in RSA 458:16-a(II):

(a) This is a long term marriage

(b) The Defendant's age, occupation, amount of income, and need for house at a low cost.

(c) The Defendant's apparent lack of opportunity to acquire future

capital assets should she be forced to sell the marital home.

(e) The Defendant's need to occupy the residence to provide housing for her three children. The awarding of the Marital home to the Defendant in addition to the awarding of a portion of the Plaintiff's monthly pension benefits to her will best insure her ability to meet the needs of the parties' children.

Respectfully submitted,

KATHLEEN M. LEVESQUE

By Her Attorneys,

BOYNTON, WALDRON, DOLEAC,

WOODMAN & SCOTT, P.A.

By: _____
Patti Blanchette

Dated: August 24, 1992

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing Defendant's Requests for Findings of Fact and Rulings of Law has this 24th day of August, 1992, been delivered in hand to Peter J. Duffy, Esquire, counsel for the Plaintiff and Timothy Cunningham, Guardian Ad Litem.

_____

Patti Blanchette

STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY SUPREME COURT
DOCKET NO. 92-622

Ronald A. Levesque

v.

Kathleen M. Levesque

September 30, 1993

Duffy and Laufer, of Manchester (Peter J. Duffy on the brief and orally), for the plaintiff.

Boynton, Waldron, Doleac, Woodman & Scott, P.A., of Portsmouth (Patti Blanchette on the brief and orally), for the defendant.

BATCHELDER, J. The plaintiff in this divorce action, Ronald A. Levesque, appeals from an order of the Superior Court (Coffey, J.) approving the recommendation of a Master (Stephanie T. Nute, Esq.) awarding part of his military pension to the defendant, Kathleen M. Levesque. He

argues that the court improperly calculated the amount owed based upon the value of his pension at the time he filed his Libel for Divorce, rather than upon its value on the date of an earlier libel filed by the defendant but subsequently dismissed. According to the plaintiff, the dismissal of the first libel pursuant to Superior Court Rule 151 violated the mandatory tolling provision of the Soldiers' and Sailors' Civil Relief Act (SSCRA), 50 U.S.C. App. Section 525. We affirm.

The plaintiff, on active duty in the Air Force until 1991, married the defendant in 1968 while in the service. On October 23, 1984, the defendant filed for divorce in Rockingham County Superior Court. The plaintiff filed a pro se appearance on December 3, 1984, listing his address as Portsmouth, New

Hampshire. In 1985, the plaintiff was transferred to England, where he remained for six years. After the initial Libel for Divorce was filed and while the plaintiff was in England, the parties discussed their divorce and determined that it was in their mutual financial interests to remain married. On March 11, 1987, the defendant's libel was dismissed on the court's own motion pursuant to Superior Court Rule 151 because the file had been inactive for over two years. When the plaintiff returned from England in 1991, he filed his own libel, which is the subject of this appeal. In determining the amount of the plaintiff's military pension benefits to be awarded to the defendant, the court used May 7, 1991, when the plaintiff filed the libel, as the operative date, awarding the

defendant fifty percent of all pension benefits acquired by the plaintiff by virtue of his military service from September 21, 1968, until May 7, 1991.

The plaintiff contends that the Superior Court erred in not calculating the pension award from the date of the 1984 divorce libel, arguing that the tolling provision of Section 525 of the SSCRA rendered ineffective the dismissal of the initial libel filed by the defendant. The defendant counters that the SSCRA does not apply in this case, and that, as the plaintiff did not make this argument below, it is not preserved for appeal.

The record shows that no argument based on the SSCRA was made by the plaintiff in Superior Court. While ordinarily such a lapse would foreclose consideration of an issue on appeal,

other courts have held that the mandatory language of Section 525 permits a party to raise the issue of the statute's application for the first time on appeal. See, e.g., Ricard v. Birch, 529 F.2d 214, 216 (4th Cir. 1975). The plaintiff in Superior Court sought to have his pension divided with reference to the date of the initial libel, albeit not on the ground of the SSCRA tolling provision. We hold that the issue is properly before us.

The Soldiers' and Sailors' Civil Relief Act "suspends various civil liabilities of persons in military service." Conroy v. Aniskoff, _____ U.S. _____, _____, 113 S. Ct. 1562, 1563-64 (1993). Section 525 of the Act provides in pertinent part:

"The period of military service shall not be included in computing any

period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service...."

50 U.S.C.S. App. Section 525. This provision operates to toll an otherwise applicable statute of limitations. See T. Folk, Soldiers' and Sailors' Civil Relief Act: Tolling of Statutes of Limitations under [section 525] of the SSCRA, 102 Mil. L.R. 157 (1985).

Superior Court Rule 151 provides: "All marital cases, which shall have been pending upon the equity docket for two years, shall be dismissed." Rather than a statute of limitations, whose purpose is to eliminate the filing of stale claims, Keeton v. Hustler Magazine, Inc., 131 N.H. 6, 14, 549 A. 2d 1187, 1192 (1988), Rule 151 is on its face addressed to action already brought. It is a housekeeping rule designed to clear the docket of cases that parties have failed to prosecute.

The United States Supreme Court, construing other language in Section 525, has held that Congress intended a literal interpretation of that section. Conroy v. Aniskoff, _____ U.S. at _____, 113 S. Ct. at 1565-66. We conclude, therefore, that the statute's directive to toll the time "for the

bringing of any action, " 50 U.S.C.S. App. Section 525 (emphasis added), means precisely what it says, "and has no applicability to an action duly filed and served...." Zitomer v. Holdsworth, 449 F. 2d 724, 726 (3d Cir. 1971). This interpretation has been adopted by other courts considering similar questions. See Ricard v. Birch, 529 F. 2d at 217; Zitomer V. Holdsworth, 449 F. 2d at 726; Zarlinsky v. Laudenslager, 402 Pa. 290, 296, 167 A. 2d 317, 320 (1961). But see Buttler v. City of Los Angeles, 153 Cal. App. 3d 520, 200 Cal. Rptr. 372, cert. denied, 469 U.S. 883 (1984); Cahill v. Northeast Airlines, Inc., 42 A.D. 2d 564, 344 N.Y.S. 2d 372 (1973).

The master found that "the Plaintiff had full knowledge of the [original] divorce action, that he and

the Defendant discussed it from time to time through the years but that, for whatever reason but by mutual agreement, both parties decided not to pursue the action at that time." In the absence of a record of the proceedings below, this finding is presumed to be supported by the evidence. See Dombrowski v. Dombrowski, 131 N.H. 654, 663, 559 A. 2d 828, 833 (1989). The plaintiff's subsequent filing of a Libel for Divorce in 1991 indicates his awareness of the dismissal of the prior action; his proceeding anew instead of moving to vacate the dismissal order indicates his acquiescence in it. We hold that the trial court's use of the 1991 filing date as the basis for calculating the defendant's share of the pension benefits did not violate 50

U.S.C.S. App. Section 525.

Affirmed.

All concurred.

FILED
JAN 13 1994

(2)

No. 93-965

In The

Supreme Court of the United States

January Term, 1994

RONALD A. LEVESQUE

Petitioner,

v.

KATHLEEN M. LEVESQUE

Respondent,

On Petition for Writ of Certiorari to

The New Hampshire Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

Patti Blanchette
Boynton, Waldron,
Doleac, Woodman &
Scott, P.A.
82 Court Street
P.O. Box 418
Portsmouth, NH 03802-0418
(603) 436-4010
Attorney for Respondent
and
Counsel of Record

BEST AVAILABLE COPY

32 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES . . . . . iii, iv & v

INTRODUCTION 1

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED SINCE THE PETITIONER DID NOT REQUEST RELIEF AS PROVIDED IN THE ACT 6

SUPERIOR COURT RULE 151 IS A PROCEDURAL COURT RULE, NOT AN "ACTION OR PROCEEDING" TO WHICH 50 U.S.C. APP. §525 APPLIES. 11

THE PETITIONER HAS WAIVED ANY RIGHT TO CLAIM THE PROTECTIONS OF THE ACT. 22

CONCLUSION 26

CERTIFICATE OF SERVICE 27

TABLE OF AUTHORITIES

PAGE

CASES

Blankenship v. Blankenship
82 So.2d 335 (Supreme Ct. Ala. 1955) 21

Boone v. Lightner,
319 U.S. 561 (1943). 10, 22

Buttler v. City of Los Angeles
200 Cal. Rptr 372 (Cal. App. 2 Dist. 1984) 16, 17 18, 19

Cace v. Cace,
124 N.E.2d 856 (1955). 9

Cahill v. Northeast Airlines, Inc.
344 N.Y.S.2D 372-73 (1974) . . 18, 19

Conroy v. Aniskoff
_____ U.S. _____
(decided March 31, 1993) . . . 16

Deacon v. Witham
499 N.Y.S. 2d 317, 319 (Cnty.Ct. 1985). 21

Hackman v. Postel
675 F.Supp. 1132 (N.D. Ill. 1988) 21

Johnson v. Burken
930 F.2d at 1204 24

Keefe v. Spangenberg
533 F.Supp. 49 (W.D. Olk. 1981) 22

Koser v. Koser
27 N.W.2d 162 (Supreme Ct. Neb. 1947) 24

LaMar v. LaMar
505 p.2D 566, 568-69 (Ariz. App. Ct 1973) 24

Olsen v. Davidson
350 P.2d 338, 340 (Supreme Ct. Colo. 1960). 25

Reynolds v. Reynolds
134 P.2d 251, 255 (Cal. Supreme Ct. 1943). . . . 21

Ricard v. Birch,
529 F.2d 214, 217 (4th Cir. 1976) 13

Roqueplot v. Roqueplot
410 N.E.2d 441 (Ill. App. 1980). 20, 23

Swartz v. Swartz
412 So.2D 461 (Fla. App. 1982). 21, 22

Thornley v. Superior Court of the City and County of San Francisco
201 P.2d 567, 568 (Cal. App. 1949) 14, 15

Zarlinsky v. Laudenslager
167 A.2d 317, 318 (Pa. 196). . 13, 14

Zitomer v. Holdsworth
449 F.2d 724 (3rd Cir. 1971) . 12, 13

STATUTES AND COURT RULES

50 USCS Appx. §§501, et seq. . . 3, 8

50 USCS Appx. §520 9

50 USCS Appx. §520(3). 9

50 USCS Appx. §520(4). 8

50 USC App. §521 7

50 USCS Appx. §525 . . . . . 11, 12
13, 14
15, 16
17, 18
19, 24
25, 26

Superior Court Rule 151. . . . . 2, 11
12, 13
23

BOOKS

Douglas, N.H. Practice,
Family Law 20, 21

No. 93-965

In The

Supreme Court of the United States

January Term, 1994

RONALD A. LEVESQUE

Petitioner,

v.

KATHLEEN M. LEVESQUE

Respondent,

On Petition for Writ of Certiorari to

The New Hampshire Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

In 1980, the parties moved to Portsmouth, New Hampshire, where the Petitioner was stationed at Pease Air Force Base. They purchased a home off base, where the Respondent continues to reside today. By Libel dated October

23, 1984, the Respondent filed for divorce. The Petitioner was served in-hand in Portsmouth, New Hampshire on November 1, 1984. He filed a pro se appearance in the Rockingham County Superior Court on December 3, 1984. In 1985, the Petitioner accepted an over-seas assignment and moved to England. The Respondent remained in Portsmouth with the parties' children in the marital home.

Over the next few years, the parties spoke on occasion and discussed their divorce and decided that neither one of them would go forward with it. After a two-year period, the Superior Court dismissed the Libel for Divorce in accordance with Superior Court Rule 151, on March 11, 1987. The Petitioner then filed his Libel for Divorce dated May 7, 1991 on or about June 1, 1991, on the

grounds of irreconcilable differences. The Respondent filed her Answer and Cross Libel on July 2, 1991. No replication was filed by the Petitioner, and no request for relief pursuant to the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. Appendix §§ 501, et seq. (hereafter "SSCRA" or "Act") was made. A pretrial conference was requested by the Respondent and held on August 22, 1991. No request for relief under the SSCRA was made. On February 12, 1992, a hearing was held on the Respondent's Motion for Contempt following the Petitioner's failure to pay child support. No mention of the SSCRA was made. When the case did not settle the parties agreed to the scheduling of an additional pretrial conference in an effort to resolve it as quickly as possible.

The Petitioner then moved to amend his Libel to allege adultery. No mention of the SSCRA was made.

Following the hearing on the Petitioner's Motion to Amend his Libel, held on March 18, 1992, the Master denied the Petitioner's Motion to Amend. A second marital pretrial conference was also held on March 18, 1992. Both parties submitted proposed orders and a marital Pretrial Conference Order was issued. No mention was made of the SSCRA and no request for relief under the Act was made. Similarly, at the final hearing on the merits of the Petitioner's Libel for Divorce both parties submitted Proposed Orders and Requests for Findings of Fact and Rulings of Law. No mention of the SSCRA Act was made and no request for relief under the Act was filed.

Based on the testimony of the parties at trial, the Superior Court specifically found that the parties acquiesced in not pursuing their first divorce action and that both parties benefitted financially from their continued marital status. The Master noted that the parties' earlier divorce action had been dismissed without objection. (See Petition for Writ of Certiorari, p. 31; pp. 34-35; and p. 52).

Respondent respectfully draws this Court's attention to the Petitioner's Requests for Rulings of Law presented to the Superior Court (Petitioner's Writ of Certiorari, pp. 44-47.) As the Court can readily determine no request for relief under the Soldier's and Sailor's Civil Relief Act was made.

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED SINCE THE PETITIONER DID NOT REQUEST RELIEF AS PROVIDED IN THE ACT

The Petitioner concedes in his statement of the case that the provisions of the Soldiers' and Sailors' Relief Act were not raised in pleadings prior to trial, but he neglects to mention that the provisions of the Act were not raised during the trial or in any Request for Reconsideration filed upon the issuance of the Court's decision.

At no time did the Petitioner request relief in accordance with the Act. To the contrary, the parties' divorce was granted on the Petitioner's own Libel for Divorce, which was filed at the conclusion of his military service.

Various Sections of the Act provide the methods of requesting relief:

Section 521 provides that:

> "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

Again, the Petitioner made no request for relief under that Section of the Act, either during his period of military service or within sixty days thereafter. Instead, he opted to file a Libel for Divorce of his own. A year and a half later, following a long and intensely litigated divorce, unhappy

with the results of the Court's action, he raised the tolling provisions of the Act . . .

Section 520(4) relating to default judgments states clearly that

> (4)If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service or within thirty days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative not later than ninety days after the termination of such service be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act [50 USCS Appx. §§ 501 et seq.] shall not impair any right or title acquired by any bona fide purchaser for value under such judgment.

The Petitioner made no request to reopen or to vacate the dismissal of the first Libel for Divorce. Furthermore, 50 USCS §520(3) states that the provisions of §520 relate to actions or proceedings in which a person is a party "if such party does not personally appear therein or is not represented by an authorized attorney." In this case, the Petitioner had personally appeared.

When the Petitioner filed his appearance in the parties' first divorce action--thereby consenting to the jurisdiction of the Superior Court and its procedural rules--he was already in active military service. By filing his appearance the Petitioner voluntarily submitted to the jurisdiction of the Court. Cace v. Cace, 124 N.E.2d 856 (1955).

In Boone v. Lightner, 319 U.S. 561 (1943) this Court, while stating that the provisions of the Act should be liberally construed, also stated that discretion was vested in the lower courts to insure that the immunities provided under the Act were not put to unworthy use. Boone v. Lightner, 319 U.S. at 575.

It is undisputed that the Petitioner never requested relief under the Act, despite having been represented by three different attorneys during the course of his divorce litigation. The New Hampshire Supreme Court correctly found that no argument based on the Soldiers' and Sailors' Relief Act was made by the Petitioner in Superior Court. (Petition for Writ of Certiorari, p. 61).

SUPERIOR COURT RULE 151 IS A PROCEDURAL COURT RULE, NOT AN "ACTION OR PROCEEDING" TO WHICH 50 U.S.C. APP. §525 APPLIES

The Petitioner argues that Superior Court Rule 151 is, in effect, a statute of limitation. Despite that contention, there is no authority interpreting Superior Court Rule 151 as anything other than a procedural rule of the Superior Court. It does not set forth the requirements for "the bringing of any action or proceeding." It is instead a rule governing divorce actions that are already pending before the Superior Court. For this reason, 50 U.S.C. App. §525 does not apply with respect to the rule

A number of cases have held that 50 U.S.C. App. §525 does not apply to statutes and court rules governing

service of process or the continuation of the legal process in civil actions.

The case most on point is the appellate court decision of Zitomer v. Holdsworth, 449 F.2d 724 (3rd Cir. 1971). The appellate court in Zitomer upheld the dismissal of an action brought against a serviceperson for want of prosecution based on a court rule, just like the divorce action dismissed in this case based on Superior Court Rule 151. The court explicitly rejected the contention that the tolling provisions of 50 U.S.C. App. §525 applied to the dismissal of actions for want of prosecution. The court explained with respect to Section 525:

> "It simply tolls the statute of limitations during the period of military service and has no applicability to an action duly filed and served within the applicable statute of limitations."

Zitomer v. Holdsworth, 449 F.2d 724, 726 (3rd Cir. 1971). In Ricard v. Birch, 529 F.2d 214, 217 (4th Cir. 1976) the court followed the appellate decision in Zitomer stating that:

> "That case stands for the proposition that one whose suit is dismissed for failure to prosecute may not rely upon the Soldiers' and Sailors' Civil Relief Act to continue the action indefinitely."

Ricard v. Birch, 526 F.2d (1976) at 217 (citing Zitomer, 449 F.2d 724 (3rd Cir. 1971).

Similarly, in another case involving a Court rule which required dismissal for failure to prosecute, similar to Superior Court Rule 151, the court held that 50 U.S.C. App. §525 was not applicable to a rule which required that the parties "must act in order to protect the efficacy of the process and thus keep the action alive." Zarlinsky

v. Laudenslager, 167 A.2d 317, 318 (Pa. 1961). The Plaintiff in that case argued against the application of the court rule and attempted to rely on 50 U.S.C. App. §525. The court rejected this position stating:

> " ... this Section [Section 525] expressly applies to the limitation of time for bringing an action, not a limitation of time of the continuing of process in an action already brought, and avails the Plaintiff nothing."

Zarlinsky, 167 A.2d at 320 (emphasis in original).

In Thornley v. Superior Court of the City and County of San Francisco, 201 P.2d 567, 568 (Cal. App. 1949) the court held that 50 U.S.C. App. §525 did not suspend the time period for service of process as required under a state statute. In doing so the court explicitly rejected the military person's argument that the word "proceeding" in

Section 525 applied to the service of process or "any other procedural step taken in the prosecution of the action." Thornley 201 P.2d at 568. The court rejected this contention stating:

> The word 'proceeding' is used in its well known and accepted sense as designating a form of action somewhat different from the common action initiated by a complaint -- such as a proceeding in mandamus, prohibition or certiorari, or proceedings in probate, or those for special relief.

Id.

As explained in Thornley, the fact that Section 525 covers actions and "proceedings" was only meant to express that the law was intended to apply to not only typical civil actions before a court, but also to other forms of court proceedings such as those suggested in Thornley as well as other forms of proceedings by example in the statute itself: "any action or proceeding in

any court, board, bureau, commission, department, or other agency of government ...." 50 U.S.C. App. §525.

Conroy v. Aniskoff, ____ U.S. _____; (decided March 31, 1993) was decided just prior to oral argument in this case. In its decision, this Court upheld a literal interpretation of the Act, which expressly relates to the time period for the redemption of real property A literal interpretation of the statute as applied to the facts in the present case must result in the denial of the relief sought by the Petitioner.

The Petitioner also heavily relies on Buttler v. City of Los Angeles, 200 Cal. Rptr 372 (Cal. App. 2 Dist. 1984).

Unlike this case, Buttler involved an action brought by a serviceperson

before he had entered into military service. The court stated as the policy underlying its decision that "... to hold otherwise would discourage persons who have already filed lawsuits from enlisting in the armed services." Buttler, 200 Cal. Rptr. at 375. The circumstances of that case are diametrically different from this case in that the first divorce action in this case was filed by the Respondent, Mrs. Levesque, while the Petitioner, Mr. Levesque, was on active duty with the Air Force and stationed in the state in which the action was brought.

In addition, Buttler is distinguishable in that it did directly involve the preservation of the right to bring an action within the period of the statute of limitations, the stated purpose of 50 U.S.C. App. §525. In

Buttler, the court did not want to allow a dismissal for failure to prosecute because it might have adversely affected the serviceperson's ability to bring an action within the period of the statute of limitations. On that point, the court also relied upon Cahill v. Northeast Airlines, Inc., 344 N.Y.S.2d 372-73 (1974) in pointing out that a dismissal for failure to prosecute against the serviceperson would be an "idle gesture" in that the statute of limitations was tolled under 50 U.S.C. App. §525. However, what the Buttler court did not state with regard to Cahill was that Cahill did not hold that 50 U.S.C. App. §525 barred dismissals for want of prosecution against servicepersons. All that Cahill held was that, on the facts of the case before the court, such a dismissal would

have been an exercise in futility because 50 U.S.C. App. §525 tolled the statute of limitations so that the serviceperson could still have brought an action after the term of military service, regardless of whether the action had been dismissed for want of prosecution.

Unlike Buttler and Cahill, the statute of limitations is not at issue in this case. The dismissal of Mrs. Levesque's divorce action in no way affected Mr. Levesque's right to bring his own divorce action later. In fact, this appeal arises from the divorce action begun by Mr. Levesque just before his term of service with the Air Force ended.

In Chenausky v. Chenausky, 128 N.H. 116, 118 (1986) the New Hampshire Supreme Court held that a

serviceperson's appearance in the divorce action limited his or her right to claim a stay or tolling of any action under the SSCRA. The Court recognized that the purpose of the SSCRA was to make certain that the serviceperson had notice of the action and that a service-person could not invoke the protections of the SSCRA "unless he has failed to make any appearance at all in the proceedings that culminated in the entry of the default judgment." Chenausky, 128 N.H. at 118 (emphasis in original); see also Douglas, N.H. Practice, Family Law, §§26.05 and 26.06. See Roqueplot v. Roqueplot, 410 N.E.2d 441 (Ill. App. 1980) (recognizing that the service-person's filing of an appearance prevented a finding that military service had materially effected the service-person's representation in the case so

that he should not be allowed the protections of the SSCRA); Deacon v. Witham, 499 N.Y.S.2d 317, 319 (Cnty.Ct. 1985) holding that an appearance in the action constituted a waiver to claim the protections of the SSCRA); Reynolds v. Reynolds, 134 P.2d 251, 255 (Cal. Supreme Ct. 1943) (filing of special appearance to contest jurisdiction prevented serviceperson from claiming protection of SSCRA to stay or toll the action); see also Hackman v. Postel, 675 F.Supp. 1132 (N.D. Ill. 1988); Swartz v. Swartz, 412 So.2d 461 (Fla. App. 1982); Keefe v. Spangenberg, 533 F.Supp. 49 (W.D. Olk. 1981); Blankenship v. Blankenship, 82 So.2d 335 (Supreme Ct. Ala. 1955); Koser v. Koser, 27 N.W.2d 162 (Supreme Ct. Neb. 1947)(all holding that a serviceperson's filing of an appearance in the action prevented the

serviceperson from claiming the protections of the SSCRA).

THE PETITIONER HAS WAIVED ANY RIGHT TO CLAIM THE PROTECTIONS OF THE ACT.

> The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in the trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from service. Absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial. But in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.

Boone v. Lightner, 319 U.S. 561, 575 (1943); see also Swartz v. Swartz, 412 So.2d 461 (Fla. App. 1982)(refusing to apply the protections of the SSCRA to a serviceperson finding that "any

disadvantage to him resulted from his own intentional and informed actions.").

In Roqueplot v. Roqueplot, 410 N.E.2d 441, 443 (1980) the court recognized that the serviceperson claiming relief under the SSCRA "was not diligent in presenting his petition for relief from judgment to the court since more than two-and-one-half years had elapsed before he filed it." In this case, the Plaintiff never filed such motion or made any other request for relief. The dismissal pursuant to Superior Court Rule 151 was entered on March 11, 1987. The Petitioner completed and returned from his service with the Air Force on June 1, 1991. He began the divorce action which is the subject of this appeal on May 7, 1991, in apparent recognition of the fact that the earlier case had been dismissed. The final

Decree was issued on September 24, 1992. During all of this time the Petitioner never raised the issue of what rights he might have had under the SSCRA. It was in the Petitioner's Notice of Appeal to the New Hampshire Supreme Court that, for the first time, the Petitioner raised the SSCRA. This conduct constitutes a waiver of the Petitioner's rights to claim any form of relief under the Act even if there were grounds for such relief in this case. See Johnson v. Burken, 930 F.2d at 1204 (recognizing that the SSCRA provides procedural rights and that, "[l]ike most procedural rights it can be waived."); Olsen v. Davidson, 350 P.2d 338, 340 (Supreme Ct. Colo. 1960)(recognizing waiver of any rights under Section 525 of the SSCRA); LaMar v. LaMar, 505 P.2d 566, 568-69 (Ariz. App. Ct 1973)(denying request by

serviceperson based on the SSCRA to vacate judgment against him because of evidence that he had known of action for a long period of time and was not prejudiced in defending against it).

Petitioner's request for relief from this Court focuses, erroneously, on the question of whether the tolling provisions of Section 525 of the Soldiers' and Sailors' Civil Relief Act apply to state court rules. It ignores the fact that (1) relief under the Act was not sought until the appeal of the case to the New Hampshire Supreme Court and (2) the decision of the New Hampshire Superior Court was based on the Petitioner's own Libel.

During the year and a half of litigation in the parties' divorce proceedings, the Petitioner had ample opportunity to request an order vacating

the dismissal of his spouse's earlier Libel for Divorce, or to request that the Superior Court decide the question of whether or not the tolling provisions of the Act applied to the earlier dismissal. He chose not to do so. It was only when the Petitioner was dissatisfied with the decision of the Superior Court that he raised the issue of the tolling provisions of the Act.

While the Act is designed to provide protection to members of the armed forces while on active duty, it should not be applied without limitation when the service member has waived its provisions.

CONCLUSION

Based on the foregoing, the decision of the New Hampshire Supreme Court should be upheld, and the Petition for Writ of Certiorari should be denied.

Dated: Portsmouth, New Hampshire

January 12, 1994

Respectfully submitted,

Patti Blanchette

Patti Blanchette
Boynton, Waldron,
Doleac, Woodman &
Scott, P.A.
82 Court Street
P.O. Box 418
Portsmouth, NH 03802-0418
(603) 436-4010
Attorney for Respondent
and
Counsel of Record

CERTIFICATE OF SERVICE

I, Patti Blanchette, Attorney for Respondent and Counsel of Record, hereby certify that I have caused three (3) copies of the Respondent's Brief in Opposition to be served by U.S. Mail, postage prepaid upon Daniel A. Laufer, Esq., Counsel for Petitioner.

Patti Blanchette

Patti Blanchette